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CANADIAN LEGAL HISTORY

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CANADIAN LEGAL HISTORY

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CANADIAN LEGAL HISTORY

Professor Risk

Evaluation

The evaluation will be based primarily on written work and secondarily on participation in class, and most of this memorandum is about the written work. The purpose of the evaluation of participation in class is to dispell any belief that participation in the course can be limited to doing only the writing, and given this purpose, the evaluations will tend to be confined within a narrow range.

For the written work, each student must choose between (1) a paper, (2) three short notes, and (3) an exam. (The Council of the faculty must approve the use of an exam, but I presume this approval will be given). The choice of a paper must be made within the first three weeks of the course; the choice between the short notes and the exams can be postponed until the study week. The crucial difference between the paper and the notes is that the paper will require research going beyond the course materials, and the notes will not.

The topics for the papers will be chosen by each student who wishes to write one, in consultation with me. If you are interested see me fairly quickly; I have ideas and some bibliographies. There are no requirements about length for the papers, but a reasonable length is between 30 and 50 pages.

The topics for the notes must be chosen by each student and can be any topics that are suggested, in one way or another by the materials. The only restriction is that no more than two of them can be limited to one of the three sections of the course. You may choose, for example, a particular reading, author, section of the course, chapter, argument in class, or some theme you developed yourself. No approval from me is necessary, but you are welcome, if you wish, to discuss possibilities with me. There is no requirement about length, but a reasonable length for each note is from 10 to 15 pages.

The papers and the notes must be submitted to me on or before the last day of exams. This date is late, and extensions can be given only for substantial and unexpected difficulties.

The exam will be an invitation to discuss topics and issues raised in the materials and in the class discussion. It will be "open book" and two and one half hours long.

SECTION ONE THE COURTS IN THE NINETEENTH CENTURY

CHAPTER ONE THE KINGS BENCH AND COMMON PLEAS

NOTE

In 1788 the area that is now Ontario was divided for administrative and judicial purposes into four Districts - Luneburg, Mecklenburg, Nassau and Messe. These were later renamed Eastern, Midland, Home and Western respectively. The new districts were in part a response to the complaints of merchants and traders about the failure of law enforcement in the area around Detroit. Complaints were made about "the hardships and expence of being obliged to resort to Courts distant many hundred miles for the obtaining of payments of just debts which in many cases become so burdensome that the trouble, expence and uncertainty was nearly equivalent to a denial of justice." In each new district, a Court of Common Pleas was established, with unlimited civil jurisdiction and no criminal jurisdiction. Three judges were appointed for each District, only one of whom was a lawyer. The lack of judicially trained appointees alarmed some merchants who feared continuing conflict of interest if their fellow traders and competitors were also required to perform judicial functions. The procedure was informal, and is briefly described in the Cartwright statement. An appeal could be made in cases involving £10 to a Court of Appeal - the Court - in Quebec, shillings and in cases involving over £500 from Quebec to the King in Council in England.

A Court of King's Bench, which held sessions in Quebec and Montreal only, had unlimited criminal jurisdiction. Commissions of Oyer and Terminer and Goal Delivery were issued to authorize trials in the new Districts, and lesser offenses were tried by Justices of the Peace in Courts of General Sessions of the Peace, created in 1778.

In 1791, the Constitutional Act laid the basis for the division of Upper Canada and Lower Canada. In 1792, the first statute of Upper Canada enacted that "in all matters of controversy relative to property and civil rights, resort shall be had to the Laws of England, as the rule for decision of the same", and the second statute enacted that "all and every issue and issues of fact ... shall be tried and determined by the unanimous verdict of twelve jurors..."

The first Lieutenant-Governor of Upper Canada was John Graves Simcoe, a soldier by training who had developed considerable admiration for the Loyalist opponents of the American rebellion during his first period of service in North America. As Lieutenant Governor, Simcoe was determined to make Upper Canada a bastion of British power in North America. He sought to provide a "free, honourable British Government" characterized by the "pure Administration of its Laws". He hoped to "inculcate British Customs, Manners, and Principles in the most trivial, as well as serious matters" and expressed a determination to make the institutions of the province "the image and transcript of Britain."

twice each month in each District by any two Justices of the Peace, and had jurisdiction over claims not exceeding 40 shillings. The procedure was extremely informal. In 1794, the District Courts were created. These were courts for each District, and had jurisdiction over claims not exceeding 40 shillings. The procedure was more complex and within a few decades became substantially the same as the procedure of the Court of King's Bench.

EXCERPTS FROM A SPEECH BY RICHARD CARTWRIGHT IN THE EXECUTIVE COUNCIL, JUNE 10, 1794

There is no measure more incontestable in politics than that a government should be formed for a country, and not a country strained and distorted for the accommodation of a preconceived or speculative scheme of government; that in all the several departments of it, it should be calculated for performing the business of the department in a manner the least tedious and embarrassing to the public, rather than for conferring splendour and emolument upon individuals. This is a principle that every man who is called to the important business of legislation should bear constantly in mind, but more especially so when he comes to deliberate respecting the mode of administering justice, in which every individual is, more or less, immediately interested. And as the British Legislature has left us unrestrained in everything that does not militate with the constitution they have given us, I apprehend we are at perfect liberty, in the present instance, to pursue this principle to its full extent. Since the settlements which were formed in this country after the American War began to acquire any degree of stability, that part of the administration of justice which relates to property and civil rights has been managed by Courts of original and exclusive jurisdiction (subject to the revision of a Court of Appeals) erected in each of the districts into which it has been divided. In these Courts every cause might be, and has been, decided with very little expense of time and money to the suitors; how greatly to their satisfaction, let the solitary instance of a single appeal determine. This arrangement was formed under the auspices of a noble Lord who has ever bestowed the most friendly and paternal attention to the welfare of this Province; and though I feel, from the experience of my own personal incapacity, that the Judges who preside in these domestic tribunals as I may without impropriety call them, may in one instance at least be changed with advantage; yet I do not hesitate to affirm that, regard being had to the circumstances of the Province, the constitution of the Courts themselves, can be altered only for the worse. Yet this establishment, so well adapted to the nature of the country, the present Bill is intended totally to overturn, and to erect in its stead a system which, by the expense, delays and embarrassments that must necessarily attend it, will infallibly operate as a denial of justice in nine out of ten, I had almost said ninety-nine out of a hundred cases that our small and uncomplicated affairs are likely to produce. In England, where the system now proposed to us has long obtained, the "law's delay" has been frequently and pathetically declaimed on as

cery and exchequer equity jurisdiction in New York in 1733–1737, and yet himself served as an apparently untroubled chancellor in New Jersey after 1738. His inconsistency is typical of the era, and it indicates the ephemeral character of so many of the seemingly profound constitutional struggles of the first half of the century. Like so many others, the problem of the chancery courts arose fitfully, ran close to the surface of politics and ideology, and did not really have to be "solved." In the first half of the century ideas were brittle and discontinuous, contrasting dramatically with the more radical character of constitutional rethinking which developed after mid-century.

These first, tentative results of a study of colonial chancery courts confirm the view that we must learn far more about the legal process in colonial life if we are fully to understand the development of early American society. The real challenge is not to learn about the relatively infrequent intersection of law and political crisis, but to find out how legal institutions affected daily life.

A NOTE ON EQUITY IN NOVA SCOTIA

In Nova Scotia the Court of Chancery was established simultaneously with the Courts of Common Law in 1749. The Governor, with and later without members of his Council, exercised Chancery jurisdiction until 1825 when the first Master of the Rolls was appointed. In History of Nova Scotia, Haliburton discusses problems which were not unknown in other chancery courts:

—

> "The Governor is Chancellor in office. The union of these two offices is filled with difficulties, and when the Governor is, as has been the case in all the Colonies of late years, a military man, they seem wholly incompatible . . . The Court of Chancery in this colony has never been conducted in a manner to create the dissatisfaction alluded to in other Provinces, but the increased business of the Court, the delicate nature of the appointment, and the difficulties attending the situation, induced our late Lieutenant-Governor, Sir James Kempt, to request his Majesty's Ministers to appoint a professional man to fill the situation of the Master of the Rolls, and the Solicitor-General has been appointed to that office, with a Provincial salary of £600 a year. This is the first appointment of the kind ever made in the Colonies. It may still be doubted whether it would not have been more advantageous and convenient to the country at large to have

> abolished the Court altogether, and to have empowered the Judge of the King's Bench to sit as Judge in Equity at stated and different terms from those of the Common Law Court. The nature of the Court as at present constituted admits of great delays. An appeal lies from an interlocutory decretal order of a Chancellor to His Majesty in Council and so toties quoties, by means of which the proceedings may be protracted by a litigious person to an indefinite length. The unnecessary prolixity of pleadings which characterises the Chancery at home has been introduced into practice here, and the expense and delay incidental to its proceedings are not calculated for the exigencies and means of the country."

Generally, the Governor was a layman, untrained in equitable matters who presided with the Council and the assistance of legally qualified Masters in Chancery. The title "Master of the Rolls" appears in the chancery records before the appointment of a Master of the Rolls by royal commission. However, the early title holders were without judicial authority and were apparently merely senior clerks. After the appointment by royal commission, the Master of the Rolls presided in Chancery, but an appeal lay to the Governor as Chancellor.

Charles J. Townshend, on whose account this note is based (Townshend, "History of the Court of Chancery in Nova Scotia" 20 Canadian Law Times, 14, 37, 74, 105, (1900) indicated that foreclosure proceedings were the most common business of the Chancery Court. He lists the following subjects of orders and decrees:

> bills to set aside agreements—for injunctions—for injunctions against proceedings at law—for account and relief—for foreclosure—for specific performance—for account and dissolution of partnership—for discovery—for redemption—for contribution among sureties—for dower—for partition—for writs of *ne exeat regno* — for *scire facias* to repeal letters patent—for administration of trusts and estates — for writs of *de lunatico inquirendo*—for writs of *certiorari*—and lastly one application for a writ of *audita querela*,

Initially, the Nova Scotia Chancery seems to have followed closely the procedure of the Irish Court of Chancery. But dissatisfaction with the delay and expense of Chancery led to a commission of inquiry into the reform of practice and proceedings in the Courts of Law and Equity (2 Wm. IV c. 42). Some of the more cumbersome rules were then eliminated by reforms of the 1830's and 1840's which anticipated much of the later Judicature Act. The Master of the Rolls was constituted a judge in chancery. The Master of the Rolls was made ineligible for elective office. Also, The Master of the Rolls along with Judges of

the N.S. Supreme Court were made independent of the Crown in that their offices could be held during good behaviour and the appointments would not be terminated by the death of the sovereign.

In 1855 Nova Scotia passed "An Act for abolishing the Court of Chancery and conferring Equity Jurisdiction on the Supreme Court". This action was apparently based on the objection to Chancery that "its forms, delays, and expensive machinery exclude a vast amount of business which ought to be adjudicated on by it". There was also personal animosity towards the Master of the Rolls. Townshend saw certain unfortunate consequences of the abolition:

> Whether on the whole a mistake was committed in abolishing the Court of Chancery or not, is fairly open to argument. Looking at the question in the light of experience, I come to the conclusion that the administration of law and equity by one tribunal is best, and most conducive to the interests of suitors, and in so far as that was the object of the Legislature it was wise. This object, however, was not accomplished except in name, for our legislators of that day had not grasped the basis on which the fusion of law and equity could be brought about. Indeed, it was not successfully accomplished in England for many years after, and then only after most patient and searching investigation by the greatest legal minds in the country. What it did effect was a serious muddle in the administration of justice, and its result was most injurious in its effects on the legal profession. It is easy to destroy an old existing institution, but it takes time and men of genius, knowledge, and experience to reconstruct. The best evidence of the mistake then committed was that in the very short period of eight years the Legislature found it necessary in the public interests to re-establish the same Court under another name—the Court of Equity—to the Judge of which all equitable business was again exclusively assigned. Great injury was brought upon the legal profession by the abolition of the Court of Chancery, in leading to the neglect of the study of equity jurisprudence. The lawyers of the succeeding generation, and until the Judicature Act was brought in, devoted their energies almost entirely to the common law; not realizing the necessity, they rarely acquired any thorough knowledge of equity principles and procedure. Equity as administered in the Court of law — at least up to the time the late Mr. Justice Ritchie became Equity Judge—was not remarkable for its depth and learning and adherence to sound principles, and there was little encouragement to pursue it.

Part (c) Upper Canada

Falconbridge in an essay on "Law and Equity in Upper Canada" (63 University of Pennsylvania Law Review 1, 1914) observed that "the court was sometimes embarrassed in the border land between equity and law by the lack of equitable jurisdiction". The following cases illustrate some of the practical limitations which the residents of Upper Canada faced in the absence of equitable jurisdiction.

JONES v CAPREOL, (1836), 4 U.C.Q.B.(O.S.) 227

[The claim was, in substance, to recover land that Jones had conveyed to Capreol, for about one twelfth of its value, after having been drinking continually for two days at Capreol's house.]

Robinson, C.J.:

It has been contended by the defendant that if Mr. Jones, when he executed the deeds, was aware what he was doing, he is necessarily bound in a court of law; that no mental imbecility shor of absolute incapacity can avail as a defence; and that although the practising upon a mind weakened by intemperance or disease and the obtaining a bargain manifestly unequal under such circumstances, may be morally indefensible, still there can be no relief but in equity.

The doubts which the court have entertained upon this point have led to very frequent discussions, and an attentive examination of the question; but I believe I may say that there is now no difference of opinion among us upon this very important part of the case. It did not appear to me at the trial to admit of doubt, that courts of common law had a jurisdiction in cases of fraud sufficiently extensive to protect persons of unsound mind--though they might not be absolutely and to all intents insane--from being ruined by the artifices of individuals aware of their imbecility and willing dishonestly to take advantage of it, by inveigling them into catching bargains. What belongs exclusively to courts of law, and what to courts of equity, in cases of this description, is an interesting and important enquiry; and indeed the inquiry is not a little

cause there can be no danger of fraud in a transaction under the sanction of the court. Where, then, is the danger of fraud in the present case? Kilborn has given Forester his bond to bind himself to his part of the agreement; under it Forester has received the estate. There can be no doubt as to the terms so far as the bond exhibits them, nor any danger of fraud as to the terms of that bond, because the defendant has sanctioned its authenticity by accepting it, and by holding it as compulsory upon the opposite party. The only possibility of fraud in such a case that I can see is the possibility of Forester's defrauding Kilborn of the purchase money. He seems to think he can do it under cover of a statute made to prevent frauds; but he should remember that the statute (as great judges have said) is to be used not as a sword but as a shield, and that, as was observed by the court in 3 Burr 1919, the statute being passed to prevent fraud, it shall never "be so turned, construed, or used as to protect or be a means of fraud."

If the estate had not been conveyed by the one and received by the other, and if the parties were litigating upon an alleged agreement, either of them charging the other for not conveying, or for not accepting and paying for it, then it is clear the Statute of Frauds would preclude any recovery upon such an agreement unless it were in writing and signed; but here the act is done; the question is not as to the agreement about it, but the legal consequences of it, and the obligations arising from it. I do not, however, state it to be my opinion that an agreement is not in this case supplied by the evidence, supposing an agreement necessary.

NOTE

Notwithstanding the constraints illustrated in the preceding cases, Upper Canada was not entirely without the means of handling certain issues with which a court of equity might be expected to deal. The Court of Requests, established in 1792 and presided over by two or more Justices of the Peace (or Magistrates) could determine claims for the recovery of small debts, not exceeding forty shillings. In 1793 legislation created a provincial Court of Probate and Surrogate Courts to provide for the probate of wills and the administration of intestate estates of personal property only. In 1827 jurisdiction over guardianship was conferred upon the Surrogate Courts.

> for suing at law or in equity for any mortgage money or for any legacy, there is a proviso, "that in respect to persons *now entitled to an equity of redemption,* or to any legacy, the right to bring an action or to pursue a remedy for the same, shall not be deemed to be extinguished or barred by lapse of time, *until the expiration of five years from the time that an equitable jurisdiction shall be established in this province, and in the exercise of its powers;* provided that shall happen within ten years from the passing of this Act."[20]

NOTE THE BEGINNINGS

Although reference to "the several courts of law and equity" appears in the Upper Canadian statute of 1792 which introduced the laws of England to the province, there was no indication that the legislature intended to recognize equity for the purpose of deciding any question of law and civil rights. Nor was it evident that the legislature had determined to confer equitable jurisdiction on the superior courts. Again, in 1794, the "Act to establish a Superior Court of Civil and Criminal Jurisdiction" which created the Court of King's Bench for Upper Canada did not discuss the introduction of equitable jurisdiction. As a consequence of these omissions, the creation of a Court of Equity in Upper Canada was long delayed. This delay and the process by which equity ultimately reached Upper Canada in 1837 require some explanation.

An attempt to account for the initial omission involves the suggestion that a court of equity was not required in the young colony:

> "Most heads of families were farmers, and the majority of them held their lands directly from the crown. Few problems arose for these settlers where a chancery court would be required for their solution. Nor could the population scattered over hundreds of miles of forest wilderness, afford the expense of maintaining such a court or of being a suitor in one."

Yet we have noted the American experience and are aware that the desirability of equitable jurisdiction was not long in being recognized. Lieutenant-Governor Hunter's letter of 1 August 1801 to the colonial Secretary, the Duke of Portland demonstrates the early concern of the Upper Canadian community for equitable jurisdiction. This initiative was rejected by the imperial authorities the following year on the grounds that the governor was "already vested with sufficient authority to exercise an Equity Jurisdiction". According

to this prerogative view, the Governor as Keeper of the Great Seal for the Province was considered ipso facto to be provincial chancellor and was entitled to seek the advice of judges and law officers in the performance of judicial duties. Not being legally trained, however, Hunter and other governors were disinclined to assume judicial responsibilities.

For nearly three decades, the situation remained unchanged while residents of the province continued to experience the difficulties and obstructions associated with the limits of common law jurisdiction. In 1827, the question was revived, this time by the Colonial Office. Lord Bathurst concluded that the lack of an equity court in Upper Canada had produced "a failure of Justice in those numerous and most important cases which belong exclusively to courts of that nature" and he urged Lieutenant Governor Maitland to consider the steps necessary to ensure that the inhabitants of the province would no longer be deprived of the powers of equity. Significantly, the old prerogative view was losing favour:

> "The rapid growth of the population, and the consequent increase in the number of commercial and other transactions in the province, must be met, not only by a proportionate increase in the number of the Judges, but perhaps also by an enlargement of their jurisdiction. I understand that at present there is no tribunal in the country discharging the functions of a Court of Equity, and that there is consequently a failure of justice in those numerous and most important cases which belong exclusively to Courts of that nature. In the probable advance of this province, the want of a tribunal competent to execute trusts, and to protect the property of infants, must be felt as an extreme inconvenience. It has, therefore, occurred to me as a subject highly deserving attention, whether the judicial office of Chancellor, under the title of Master of the Rolls, or Vice-Chancellor, might not advantageously be committed, for the present, either to the Chief Justice, or to one of the inferior Judges of the Court of King's Bench. An arrangement of this nature might, if necessary, from the basis of some systematic arrangement in future times.
>
> "Your excellency is aware that a similar measure has been adopted in Nova Scotia, and that under a recent Act of Parliament, a system very similar has been introduced into the Court of Exchequer in England.

> "You will consider, and report to me whether this measure, or any modification of it, could be conveniently adopted in Upper Canada."

At the same time John Walpole Willis, an English barrister with considerable equity experience, was sent to fill a vacancy on King's Bench. Willis carried with him a letter instructing Maitland to confer upon Willis responsibility for jurisdiction in equity, but these arrangements were not concluded. Willis' impact on Upper Canada's legal institutions is discussed further under the heading of "Independence of the Judiciary".

The renewed interest in the equity issue in the late 1820's did not result in any immediate institutional changes. It was significant, however, that imperial officials acknowledged the importance of colonial acceptance of whatever institutional arrangements would ultimately be made. This is the context in which the following comments of 1828 should be viewed. The first is a statement of Campbell C.J. and Sherwood J. of the Upper Canada Court of King's Bench and the second, the opinion of John Beverley Robinson, then Attorney-General of the province. The comments continue the lengthy debate about the need for a court of equity in Upper Canada but in addition they address the need to relate the structure and scope of the proposed court to (a) social and geographic conditions in Upper Canada and (b) the perceived functions and responsibility of equity jurisdiction.

Four years later the debate was again renewed in large measure through the work of a Select Committee of the Legislative Assembly. The Committee's 1832 Report repeats a list of those instances where the powers of equity are needed to achieve just results. As well, the Report makes a number of vigorous assertions regarding structural arrangements. These are noteworthy in light of mid-century reforms and the work of the Judicature Act which are considered in later sections.

While delay in the introduction of a court of equity in Upper Canada was in large measure due to the existence of other legislative priorities, certain objections were raised directly against the proposal. One type of criticism saw equity as an institution whose workings favoured the interests of the affluent and established. A second ground for objection focused on the perception of English equity proceedings as cumbersome, prolonged and exceedingly costly. To some degree these criticisms are mutually reinforcing. Similar criticisms had been part of the American chancery debate of the previous century. If the two colonial experiences are contrasted, a tentative conclusion would be that resistance to the prerogative conception of chancery jurisdiction was more pronounced or more effectively articulated in the American experience.